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PRIMA NOVA SDN BHD

v.

AFFIN BANK BHD

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HIGH COURT MALAYA, KUALA LUMPUR
TEE AH SING J
[CIVIL SUIT NO: S5-22-984-2004]
23 DECEMBER 2009

C ***BANKING:*** *Banker and customer - Contractual relationship - Contractual effect of Rules and Regulations Governing Operation of Current Account - Contractual provisions pertaining stolen and forged cheques - Whether bank protected against liability in honouring stolen and forged cheques*

D ***BANKING:*** *Banker and customer - Duty of customer - Forged cheques - Signatures on cheques not that of authorised signatory - Whether drawer knowingly or negligently contributed to forgery or making of unauthorized signature - Cheques stolen during robbery - Delay by customer in informing bank - Failure by customer to keep cheques safe - Conditions to be fulfilled by bank to invoke defence under s. 73A - Bills of Exchange Act 1949, s. 73A*

E

BANKING: *Banker and customer - Forged cheques - Signatures on cheques not that of authorised signatory - Whether drawer knowingly or negligently contributed to forgery or making of unauthorized signature - Cheques stolen during robbery - Delay by customer in informing bank - Failure by customer to keep cheques safe - Conditions to be fulfilled by bank to invoke defence under s. 73A - Bills of Exchange Act 1949, s. 73A*

F

G ***BANKING:*** *Cheques - Forged cheques - Signatures on cheques not that of authorised signatory - Whether drawer knowingly or negligently contributed to forgery or making of unauthorized signature - Cheques stolen during robbery - Delay by customer in informing bank - Failure by customer to keep cheques safe - Conditions to be fulfilled by bank to invoke*

H *defence under s. 73A - Bills of Exchange Act 1949, s. 73A*

The plaintiff operated a current account with the defendant ('the account'). A letter dated 18 November 2003 was issued by the plaintiff to the defendant to cancel several cheques of the account

I ('the Stolen Cheques'). On or about 13 November 2003 the plaintiff's premises was broken into and burgled and the Stolen

Cheques had been stolen. The Stolen Cheques were later presented to the defendant for payment and were honoured by the defendant. The plaintiff claimed that the signatures appearing on the Stolen Cheques were forgeries. The plaintiff claimed that the Stolen Cheques were not discovered earlier because the police had instructed them not to touch anything until the police had finished its investigation of the premises. The police only came to the plaintiff's premises on 15 November 2003 and they were only allowed to resume the use of the premises on 18 November 2003. Further it was impossible to notice that there were cheques missing from the cheque book because of the manner they were cut out from the cheque book. The plaintiff commenced this action seeking to recover from the defendant the amounts paid out on the Stolen Cheques. The defendant claimed that by cl. 4.2 of the Rules and Regulations Governing Operation of Current Account ("the Rules and Regulations"), the defendant was not responsible for any loss or damage occasioned by reason of any delay or omission in executing stop payment instruction by the plaintiff. The defendant also relied on s. 73A of the Bills of Exchange Act 1949.

Held (dismissing the plaintiff's claim with costs):

(1) Because of the words "Notwithstanding s. 24" in s. 73A of the Act, the provisions of s. 73A supercede the provisions of s. 24 and the defendant could make use of s. 73A as a defence in respect of forged cheques. Section 73A has modified the strict liability imposed by s. 24 of the Act. In order to succeed the defendant must prove on the balance of probabilities the following facts: (a) the signatures on the Stolen Cheques had been forged ("the 1st Condition"); (b) the plaintiff had knowingly or negligently contributed to the forgery ("the 2nd Condition"); and (c) the defendant honoured the Stolen Cheques in good faith ("the 3rd Condition"). (paras 12.4, 12.5 & 12.6)

(2) From the evidence it was clear that the signatures on the Stolen Cheques had been forged. So, the defendant had proved the 1st Condition. (paras 12.7 & 12.8)

(3) The plaintiff discovered the burglary on 13 November 2003. On 13 November 2003 itself the plaintiff knew that the cheque book had been handled during the burglary. PW2 had only informed the defendant of the burglary on 18 November 2003.

However by 18 November 2003 the Stolen Cheques had been honoured by the defendant. Nothing was done by the plaintiff to check the status of the account until 19 November 2003. Further, the cheque book was kept in the drawer of the accounts clerk and not in the safe. The plaintiff had failed to take reasonable steps to ensure the safety of the Stolen Cheques. The plaintiff had acted negligently enabling the forgery of the signatures on the Stolen Cheques to occur. Thus, the defendant had proved the 2nd Condition. (paras 12.9-12.26)

(4) The signatures on the Stolen Cheques were similar to the signatures on the specimen signatures. The defendant in good faith had honoured the Stolen Cheques. (paras 13 & 13.1)

(5) The defendant had proved its defence under s. 73A. Hence, the forged signatures were deemed to be the valid signatures of the plaintiff's authorised signatories. (paras 13.2 & 13.3)

(6) The plaintiff had agreed to be bound by the Rules and Regulations in respect of the operation of the plaintiff's account. Thus, the Rules and Regulations was part of the contract between the plaintiff and the defendant. Clause 4.2 of the Rules and Regulations provided that the plaintiff must give prompt instruction to stop payment of cheques. The plaintiff's letter instructing the defendant to stop payment of the Stolen Cheques was only received by the defendant on 19 November 2003 and by that time it was no longer possible for the defendant to comply with the plaintiff's instruction since the Stolen Cheques had been honoured by the defendant between 13 November 2003 to 18 November 2003. Clause 4.2 protected the defendant in honouring the Stolen Cheques. (paras 14.6, & 14.9-14.14)

Case(s) referred to:

Hong Wai v. United Malayan Banking Corp Bhd [1984] 2 CLJ 42; [1984] 2 CLJ (Rep) 64 HC ***(refd)***

Panca Bina Sdn Bhd v. Public Bank Berhad [1990] 2 MTC 104 ***(refd)***

Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd [1988] 1 LNS 78 HC ***(refd)***

Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd and Others [1986] 1 AC 80 ***(refd)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, ss. 24, 73A
Bills of Exchange (Amendment Act) 1998, s. 2

For the plaintiff - Allan Wong (Megat Abdul Munir with him); M/s Zain Megat & Murad
For the defendant - Wong Hock Man; M/s Azim, Tunku Farik & Wong

Reported by Amutha Suppayah

JUDGMENT

Tee Ah Sing J:

[1] At the commencement of the trial, the Ikatan Dokumen Plaintif was marked as encl. 16, Ikatan Dokumen Bahagian A Kesahihan dan Kandungan Tidak Dipertikaikan was marked as encl. 18, Ikatan Dokumen Bahagian B Kesahihan Dipersetujui Kandungan Dipertikaikan was marked as encl. 19, Ikatan Dokumen Bahagian C has been agreed as Ikatan Dokumen Bahagian B Kesahihan Dipersetujui Tetapi Kandungan Dipertikaikan was marked as encl. 20, Ikatan Dokumen Tambahan Defendan agreed as Bahagian B marked as encl. 24, Ikatan Dokumen Lanjutan Defendan Bahagian B marked as encl. 86 and Isu-Isu Yang Perlu Dibicarakan was marked as encl. 21.

[2] In this action, the plaintiff seeks to recover the total sum of RM587,800 arising from:

(a) cheque No. 431138 dated 11 November 2003 for the sum of RM9,800;

(b) cheque No. 431139 dated 18 November 2003 for the sum of RM200,000;

(c) cheque No. 431141 dated 13 November 2003 for the sum of RM98,000;

(d) cheque No. 431142 dated 17 November 2003 for the sum of RM280,000.

(Collectively referred to as "the Stolen Cheques")

[3] In para. 7 of the statement of defence the defendant has pleaded that by cl. 4.2 of the Rules and Regulations governing the operation of current account the defendant shall not be responsible for any loss or damage occasioned by reason of any delay or omission in executing stop payment instruction by the plaintiff.

In para. 10 of the statement defence it is pleaded that defendant will rely on s. 73A of the Bills of Exchange Act 1949 to defeat the plaintiff's claim or that the plaintiff's negligence had contributed to the forgery of the signatures on the Stolen Cheques.

[4] The case for the plaintiff is as follows:

4.1 Dato' Mohd Karim bin Hj. Abdullah Omar (PW1) in his witness statement (PW1A) stated that he is the Chairman/ Director of Prima Nova Sdn. Bhd. ("the plaintiff") since its incorporation in 1996. Since early 1996 the plaintiff had been a customer of Affin Bank Berhad ("the defendant"). At all material times the plaintiff operated a current account No. 0291040000006519 ("the account") with the defendant at its branch at Lot P3.4, Jalan Persiaran Perbandaran, Seksyen 4, 40000 Shah Alam.

4.2 PW1 also stated that pp. 1 and 2 of encl. 18 is the application form for the account which the plaintiff submitted to the defendant.

4.3 Pages 3 and 4 of encl. 18 is the Directors' Circular Resolution of the plaintiff dated 20 March 1996 which was forwarded to the defendant together with the application form for the account.

4.4 In the Directors' Circular Resolution it was resolved that a bank account be opened in the name of the plaintiff with the defendant's branch at Shah Alam.

Further, the defendant was empowered to honour all cheques drawn or made on behalf of the plaintiff and/or instructions given by the plaintiff in relation to the account provided that it must be compulsorily signed by both Leela Devi Suppiah and himself. Leela Devi Suppiah is the company secretary of the plaintiff.

4.5 Page 5 of encl. 18 is a letter dated 18 November 2003 from the plaintiff to the defendant to cancel the cheques of the account bearing the numbers 431138, 431139, 431140, 431141 and 431142. A

The said letter dated 18 November 2003 was issued because on or about 13 November 2003 the plaintiff's premises was broken into and burgle. B

On 18 November 2003 at about 2pm to 3pm he was informed by Leela Devi Suppiah that four cheques namely No. 431138, 431139, 431141 and 431142 has been stolen. C

4.6 Page 3 of encl. 20 is a copy of cheque No. 431138 dated 11 November 2003 for RM9,800. The said cheque was issued without his knowledge or authority. He did not sign the said cheque and the signature that appears on the cheque is a forgery. D

4.7 Page 4 of encl. 20 is a copy of the cheque No. 431141 dated 13 November 2003 for RM98,000. He did not sign the cheque and the signature that appears on the cheque is a forgery. E

4.8 Page 5 of encl. 21 is a copy of cheque No. 431142 dated 17 November 2003 for RM280,000. He did not sign the cheque and the signature that appears on the cheque is a forgery. F

4.9 Page 6 of encl. 20 is a copy of cheque No. 431139 dated 18 November 2003 for RM200,000. He did not sign the cheque and the signature that appears on the cheque is a forgery. G

4.10 Page 2 of encl. 20 is a letter dated 17 November 2003 from the plaintiff to the defendant purportedly authorizing payment of RM280,000 to one Karim bin Mohd Nasir. He did not sign the letter. The letter is a forgery. H

4.11 In cross-examination PW1 stated that p. 1 of encl. 18 is the plaintiff's application form to open the account with the defendant. From this application form the plaintiff has agreed to be bound by the rules and regulations of the defendant. I

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4.12 Pages 3 and 4 of encl. 18 is the Directors Circular Resolution of the plaintiff. In p. 4 the plaintiff agreed to be bound by the bank's rules and regulations for the conduct of the account and any amendments the bank subsequently introduced.

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4.13 Pages 7 and 8 of encl. 20 is the rules and regulations governing the operation of account issued by the defendant.

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4.14 He stated that cl. 4.2 of p. 7 of encl. 20 stated that the defendant is not responsible for any loss or damage occasioned by the delay on the part of the customer in giving stop payment instruction.

[5] Leela Devi Suppiah (PW2) in her witness statement (PW2A) D stated that she is the company secretary of the plaintiff.

5.1 The authorised signatories for the account had always been Dato' Mohd. Karim (PW1) and herself jointly.

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5.2 Page 5 of encl. 18 is a letter from the plaintiff to the defendant dated 18 November 2003 instructing the defendant to cancel the cheques of the account bearing numbers 431138, 431139, 431140, 431141 and 431142.

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5.3 The letter dated 18 November 2003 was issued because on or about 13 November 2003 the plaintiff's premise was broken into and burgled.

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5.4 On 18 November 2003 at about 2pm to 3pm when she was instructed by PW1 to prepare cheques for payments she discovered that four cheques had been stolen namely cheque numbers 431138, 431139, 431141 and 431142 ("the Stolen Cheques"). PW2 immediately called up the defendant to inform the bank that the four cheques had been stolen and to instruct them to cancel and stop H payment of the same. The said letter dated 18 November 2003 was sent to the defendant on 19 November 2003 to confirm the said instructions to stop payment.

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5.5 The Stolen Cheques were not discovered earlier because when the plaintiff's premises was broken into on or about 13 November 2003, a police report was lodged and they

had strict instructions from the police not to touch anything until the police had finished its investigation of the premises. The police only came to the plaintiff's premises on 15 November 2003 and they were only allowed to resume the use of the premises on 18 November 2003.

5.6 Further the cheque book (P1) was never removed from the premises and the Stolen Cheques were taken from the middle of the cheque book. They did not know that the Stolen Cheques were stolen until the cheque book was opened to prepare for payments.

5.7 Looking at the cheque book it is impossible to notice that there are cheques missing from the cheque book. Even if you flip through the cheque book, it's extremely difficult to detect that cheques have been removed from the cheque book because of the manner it was cut out from the cheque book.

5.8 PW2 also stated that the Stolen Cheques amounting to RM587,800 were paid out by the defendant. The defendant never called her prior to paying out on the Stolen Cheques.

5.9 The defendant has debited RM587,800 from the account. The plaintiff was charged interest on the amount of RM587,800 at the rate of 1% above the defendant's Base Lending Rate on the purported basis that the account was overdrawn.

5.10 PW2 also stated that she did not sign the Stolen Cheques and that the signatures on the Stolen Cheques are forgeries.

5.11 PW2 also said that p. 2 of encl. 20 is a letter dated 17 November 2003 from the plaintiff to the defendant purportedly authorising payment of RM280,000 to one Karim bin Mohd Nasir. She did not prepare the said letter and has no knowledge of who prepared the said letter.

5.12 In cross-examination PW2 stated that p. 1 of encl. 24 is the specimen signatures for the plaintiff's account with the defendant in 2003.

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5.13 In cross-examination PW2 stated that in 2003 she was in charge of the account department of the plaintiff in a supervisory level and when cheque needed to be prepared it was always referred to her first. She was not in charge of the day to day running of the account department of the
B plaintiff in 2003.

5.14 PW2 agreed that p. 1 of encl. 19 is the police report made by Encik Mohd Khairi bin Hj. Fiee, an account executive of the plaintiff. She agreed that it was his duty to take
C care and keep the plaintiff's cheque book. Cik Zawati was the account clerk of the plaintiff. Cik Zawati was assigned to assist Encik Mohd Khairi bin Hj. Fiee. The cheque book was never kept in the safe in PW2's room at any time.

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The cheque book was kept in the account clerk's drawer under lock and key and when cheques needed to be prepared upon PW2's instructions, the account clerk will remove the cheque book from the drawer and issue the particular cheques as needed. The account clerk will get
E PW2's and PW1's signatures.

5.15 In cross-examination PW2 stated that she knew about the Stolen Cheques on 18 November 2003 after lunch when PW1 had instructed her to make some payment and she
F had asked the account department people to prepare the cheques and that was when it was discovered and she was informed.

5.16 In cross-examination PW2 agreed that the letter (p. 5 of
G encl. 18) was issued on 18 November 2003 by the plaintiff and that only on 19 November 2003 at 12.09pm the defendant received this letter.

5.17 PW2 disagreed that only on 18 November 2003 she realised that there were four missing cheques from the
H cheque book (P1) because there was no proper checking on the plaintiff's premises from 13 November 2003 until 18 November 2003 to check the missing items.

5.18 In cross-examination PW2 stated that Encik Khairi was
I arrested and taken in by the police to assist them in the investigation.

PW2 disagreed that Khairi was negligent because he failed to trace the existence of four missing cheques until only until 18 November 2003 he discovered the missing cheques.

5.19 In cross-examination PW2 said *vide* p. 1 of encl. 18 the plaintiff has agreed to be bound by the defendant's rules for the conduct of the account. At p. 4 of encl. 18 the plaintiff has agreed to be bound by the bank's rule and regulations for the conduct of the plaintiff's account.

5.20 In cross-examination PW2 agreed that by cl. 4.2 at p. 7 of encl. 20 the bank shall not be responsible for any lost or damages occasioned by any delay in respect of the stop payment instruction issued by the plaintiff. She stated that the theft happened on 12 November 2003 and the bank only received the stop payment on 19 November 2003.

5.21 In cross-examination PW2 stated that the police instructed everyone on the floor and anyone else in fact all the company staff not to touch anything for fear that it may tamper with the evidence. She could not remember the name of the police officer who gave these instructions.

5.22 In re-examination PW2 said that although the cheque book was not kept in the safe they have always been kept safely in a lock drawer under lock.

[6] The case for the defendant is as follows:

6.1 Cik Izaniha bt. Ismail (DW1) stated in her witness statement (DW1A) that in 2003 she worked in the defendant's branch in Shah Alam. At that time she was the Pegawai Akaun Semasa. The authorized signatories for the plaintiff's account are Dato' Mohd Karim bin Abdullah Omar and Leela Devi Suppiah.

6.2 Pages 4 to 6 of encl. 20 are the plaintiff's cheques that have been paid out by the defendant between 13 November 2003 to 18 November 2003. In the said cheques the payee was Karim bin Mohd. Nasir.

[7] Hasniah bt Abdullah (DW2) in her witness statement (DW2A) stated that in 2003 she worked in the defendant's branch at Shah Alam as the Ketua Bahagian Kredit.

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7.1 The plaintiff has the account with the defendant since 1996.

7.2 According to pp. 1 to 4 of encl. 18 and p. 4 of Ikatan Dokumen Lanjutan Defenden Dato' Mohd. Karim bin Abdullah Omar and Leela Devi Suppiah are the signatories who are authorized by the plaintiff to operate the account.

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7.3 Page 4 of encl. 20 is the plaintiff's cheque No. 431141 dated 13 November 2003 made payable to Karim bin Mohd Nasir. This cheque was cashed at the counter on 13 November 2003 at 11.25am.

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DW2 has examined the said cheque and approved it for payment. DW2's initial is at the back of the cheque. DW2 also said that "Berdasarkan amalan biasa perbankan defendan, saya telah membandingkan tandatangan-tandatangan di atas cek-cek tersebut dan mendapati ianya kelihatan sama dengan tandatangan-tandatangan signatori-signatori plaintif yang sah iaitu Dato' Mohd Karim bin Hj. Abdullah Omar dan Leela Devi Suppiah seperti yang terkandung di dalam kad spesimen tandatangan untuk akaun plaintif di muka surat 4 Ikatan Dokumen Lanjutan Defendan. Oleh itu, saya telah membenarkan cek tersebut untuk ditunaikan.

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7.4 Page 5 of encl. 20 is the plaintiff's cheque No. 431142 dated 17 November 2003 made payable to Karim bin Mohd Nasir.

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DW2 also stated that "Berdasarkan penglihatan mata kasar, adalah jelas bahawa cek ini kelihatannya telah ditandatangani oleh Dato' Mohd Karim bin Hj. Abdullah Omar dan Leela Devi Suppiah yang merupakan signatori-signatori yang telah diberi kuasa oleh plaintif untuk mengeluarkan cek-cek plaintif. Tandatangan-tandatangan di atas cek ini kelihatan adalah sama dengan tandatangan-tandatangan di dalam kad spesimen tandatangan untuk akaun plaintif tersebut di ms 4 Ikatan Dokumen Lanjutan Defendan.

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7.5 The said cheque No. 431142 was cashed on 17 November 2003 at 10.35am. Before payment was made DW2 had examined the cheque and approved it for payment. DW2 put her initial at the back of the cheque.

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7.6. Between 13 November 2003 till 18 November 2003 the plaintiff never informed the defendant about the break in of the plaintiff's premises on 13 November 2003.

7.7 Defendant received the letter at p. 5 of encl. 18 on 19 November 2003 at 12.09 noon.

7.8 DW2 also stated "Ketika cek-cek tersebut ditunaikan, defendan tidak tahu bahawa tandatangan-tandatangan di atas cek-cek tersebut adalah palsu kerana tandatangan-tandatangan di dalam cek-cek tersebut kelihatannya serupa dengan tandatangan-tandatangan di dalam kad spesimen tandatangan untuk akaun plaintif tersebut. Pihak kami hanya mengetahui ianya adalah palsu apabila Mohd Khairi memaklumkan kepada kami ketika beliau datang ke cawangan tersebut pada petang 19 November 2003 yang telah menyatakan kepada kami bahawa tandatangan-tandatangan di dalam cek-cek tersebut telahpun diimbas."

[8] Maziam bin Ramli (DW3) in his witness statement (DW3A) stated that in 2003 he worked in the defendant's branch at Shah Alam as an officer cum "vault teller".

8.1 Page 6 of encl. 20 is the plaintiff's cheque No. 431139 dated 18 November 2003 and the payee of the cheque was Karim bin Mohd Nasir.

8.2. On 18 November 2003 at about noon the bank teller named Azneyda handed the cheque No. 431139 to him for confirmation of payment.

8.3. DW3 also said "Saya telah memeriksa tandatangan di atas cek tersebut dan mendapati ianya sama dengan tandatangan signatori yang terdapat di dalam kad spesimen tandatangan untuk akaun plaintif."

[9] Hajah Faridah binti Yunus (DW4) in her witness statement (DW4A) has stated that in 2003 she worked at the defendant's branch in Shah Alam as the Assistant Manager.

9.1 Page 3 of encl. 20 is the plaintiff's cheque No. 431138 dated 11 November 2003 payable to Karim bin Mohd Nasir. This cheque No. 431138 was paid on 13 November 2003 at 11.08am.

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9.2 Page 6 of encl. 20 is the plaintiff's cheque No. 431139 dated 18 November 2003 made payable to Karim bin Mohd Nasir. This cheque No. 431139 was passed for payment at the counter on 18 November 2003 at 12.36pm. This cheque has been examined by one of the defendants

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officer named Encik Maziam based on his initial at the back of the cheque. DW4 also examined the cheque on the same date based on her initial at the back of the cheque.

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9.3 DW4 also stated that "Berdasarkan amalan biasa perbankan defendan, saya telah membandingkan tandatangan-tandatangan di atas cek-cek tersebut dan mendapati ianya adalah sama dengan tandatangan-tandatangan signatori-signatori plaintif yang sah iaitu Dato' Mohd Karim bin Hj

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Abdullah Omar dan Leela Devi Suppiah seperti yang terkandung di dalam kad specimen tandatangan untuk akaun plaintif di ms 4 Ikatan Dokumen Lanjutan Defendan. Oleh itu, saya telah membenarkan cek tersebut untuk ditunaikan.

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9.4 DW4 also stated that the plaintiff never gave a copy of the police report at p. 1 of encl. 19 to the defendant between 13 November 2003 till 18 November 2003.

9.5 From 13 November 2003 till 18 November 2003 the

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plaintiff never informed the defendant in respect of the break in at the plaintiff's premises on 13 November 2003.

9.6 Defendant received the letter at p. 5 of encl. 18 on 19 November 2003 at 12.09 noon.

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9.7 When the letter was received by the defendant on 19 November 2003 cheque numbers 431138, 431139, 431141 and 431142 had already been honoured by the defendant.

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9.8 DW4 also said that under cl. 4.2 of the Rules and Regulations in respect of the account the defendant shall not be responsible for any loss or damage occasioned by reason of any delay or omission in executing stop payment instructions by the plaintiff.

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[10] The learned counsel for the plaintiff has put in a written submission dated 5 October 2009. A

10.1 The learned counsel for the defendant has put in a written submission dated 5 October 2009.

10.2 The learned counsel for the plaintiff has put in a written reply dated 23 October 2009. B

10.3 The learned counsel for the defendant has put in a written reply dated 11 November 2009.

10.4 I have considered all the written submissions. C

[11] I now give my judgment.

[12] I shall first deal with the issue whether the defendant can rely on s. 73A of the Bills of Exchange Act 1949 ("the Act") as a defence. D

12.1 By s. 2 of the Bills of Exchange (Amendment) Act 1998 (Act A1012) the Bills of Exchange Act 1949 was amended by inserting after s. 73 the following s. 73A: E

Knowingly or negligently facilitating forgery	73A. Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorised signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

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12.2 The new s. 73A came into effect from 1 July 1998.

12.3 I am of the view that because of the words "Notwithstanding s. 24" in s. 73A of the Act, the provisions of s. 73A of the Act supercedes the provisions of s. 24 of the Act and the defendant can make use of this s. 73A of the Act as a defence in respect of forged cheques. H

12.4 It is my view that s. 73A of the Act has modified the strict liability imposed by s. 24 of the Act. I

A 12.5 The cases cited by the plaintiff, namely *Panca Bina Sdn Bhd v. Public Bank Berhad* [1990] 2 MTC 104, *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn. Bhd.* [1993] 2 CLJ 31, *Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd.* [1988] 1 LNS 78 and *Hong Wai v. United* B *Malayan Banking Corp. Bhd.* [1984] 2 CLJ 42; [1984] 2 CLJ (Rep) 64 were decided before the insertion of the new s. 73A of the Act which came into effect on 1 July 1998 and therefore are distinguishable.

C 12.6 In order to succeed the defendant must prove on the balance of probabilities the following facts:

(a) the signatures on the Stolen Cheques have been forged ("the 1st condition");

D (b) the plaintiff had knowingly or negligently contributed to the forgery ("the 2nd condition"); and

(c) the defendant honoured the Stolen Cheques in good faith ("the 3rd condition").

E 12.7 From the evidence of PW1 and PW2 it is clear that the signatures on the Stolen Cheques have been forged. The defendant in para. 10(ii) of the statement of defence has averred that the signatures on the Stolen Cheques have been forged.

F 12.8 So, the defendant has proved the 1st condition.

12.9 The plaintiff discovered the burglary on 13 November 2003.

G 12.10 Page 1 of encl. 19 is the police report lodged by Mohd Khairi bin Haji Fiee, an accounts executive of the plaintiff on 13 November 2003 at 10.05am. In the report it is stated *inter alia* meja Cik Zawati telah diumpil dan (buku cek diterbalikkan).

H 12.11 From the police report it is clear that on 13 November 2003 the plaintiff knew that the cheque book has been handled during the burglary.

I 12.12 PW2 has stated that she had only informed the defendant of the burglary after lunch on 18 November 2003.

12.13 However by 18 November 2003 the Stolen Cheques have been honoured by the defendant.

12.14 There was a delay of six days to notify the defendant of the burglary.

12.15 PW2 said on 13 November 2003 they had strict instructions from the police not to touch anything until the police had finished its investigation of the premises. The police only came to the plaintiff's premises on 15 November 2003 and they were only allowed to resume the use of the premises on 18 November 2009.

12.16 In cross-examination PW2 said that she could not remember the name of the police officer who gave the instruction. Further the plaintiff did not call the police officer as a witness to substantiate PW2's allegations that the police only came to investigate on 15 November 2003 ie, two days after the burglary.

12.17 From the police report it was stated that cash of RM10,746.54 was stolen.

12.18 I reject the evidence of PW2 as being an although to justify their delay in giving the stop payment instruction to the defendant on 18 November 2003.

12.19 Further, even on 13 November 2003 the plaintiff knew that the cheque book had been touched or handled during the robbery yet the plaintiff did not immediately on 13 November 2003 inform or instruct the defendant to stop payment of all cheques drawn from the account until further notification from them. However this was not done. So, this shows that the plaintiff was negligent.

12.20 Despite knowing on 13 November 2003 that the cheque book had been touched or handled during the burglary, nothing was done by the plaintiff to check the status of the account until 19 November 2003,

12.21 PW2 admitted that the cheque book was never kept in the safe in her room but kept in the lock drawer of the accounts clerk (Cik Zawati).

A 12.22 From the police report (p. 1 of encl. 19) the lock drawer of the accounts clerk where the cheque book was kept was levered open during the burglary.

12.23 The plaintiff's witness failed to offer any explanation and/
B or justification why the plaintiff did not keep the cheque book in the safe.

12.24 I find that the plaintiff has failed to take reasonable steps to ensure the safety of the Stolen Cheques.

C 12.25 From the paras 12.9 to 12.24 aforesaid, I find that the plaintiff had acted negligently enabling the forgery of the signatures on the Stolen Cheques to occur.

12.26 The defendant has proved on the balance of probabilities
D the 2nd Condition.

[13] DW2, DW3 and DW4 had compared the signatures on the Stolen Cheques and with the specimen signatures had the account (p. 4 of encl. 86) and found that the signatures on the Stolen Cheques were similar to the signatures on the specimen signatures.
E

13.1 I find that the defendant in good faith had honoured the Stolen Cheques.

13.2 I find that the defendant has proved its defence under
F s. 73A.

13.3 Hence, the forged signatures shall operate and shall be deemed to be the valid signatures of the plaintiff's authorised signatories.

G **[14]** I shall then deal with the issue whether cl. 4.2 of the Rules and Regulations Governing Operation of Current Account ("the Rules and Regulations") applicable.

14.1 PW1 in cross-examination has said that p. 1 of encl. 18
H is the plaintiff's application form to open the account with the defendant. In the form the plaintiff agreed to be bound by the Rules and Regulations of the defendant.

14.2 Pages 3 and 4 of encl. 18 are the Directors' Circular Resolution of the plaintiff. In p. 4 the plaintiff agreed to
I be bound by the bank's Rules and Regulations for the conduct of the account and any amendments the bank may subsequently introduced.

14.3 PW2 in cross-examination said that *vide* p. 1 of encl. 18 the plaintiff has agreed to be bound by the defendant's Rules and Regulations. At p. 4 of encl. 18 the plaintiff has agreed to be bound by the bank's Rules and Regulations for the conduct of the account.

14.4 I find as a fact that the plaintiff has agreed to be bound by the Rules and Regulations in respect of the operation of the plaintiff's account.

14.5 In the application form for opening of the account the relevant parts of p. 1 of encl. 18 reads as follows:

> ... The Bank's rules for the conduct of such account are known to us and we agree to abide by and be bound by them ...
>
> **Declaration**
>
> ...
>
> We hereby agree to be bound by the Bank's rules and regulations ....

14.6 So, it is clear that the Rules and Regulations governing the operation of the account is part of the contract between the plaintiff and the defendant.

14.7 Clause 4.2 of the Rules and Regulations (pp. 7 of encl. 20) reads as follows:

> 4. Instructions
>
> ...
>
> 2. Stop Payment Instruction
>
> All instructions to stop payment of cheques must be in writing and the bank shall not be responsible for any loss/damage, occasioned by reason of any delay or omission in executing such instruction ...

14.8 In the case of *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 Lord Scarman C delivering the judgment of the Privy Council at p. 108 said:

> For these reasons their Lordships answer the general question by accepting the submission of the company that in the absence of express terms to the contrary the customer's duty is in English law as laid down in *Macmillan* and *Greenwood*. The customer's duty in relation to forged cheques is, therefore, twofold: he must exercise due care in drawing his cheques so as not to facilitate fraud or forgery and he must inform his bank at once of any unauthorised cheques of which he becomes aware.

And at p. 110 Lord Scarman said:

> If banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of the objection and of the sanction imposed must be brought home to the customer. In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that, in their Lordships' view, the true nature of the obligations of the customer to his bank where there is not express agreement is limited to the *Macmillan* and *Greenwood* duties. Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts.

14.9 In our case there is express terms in cl. 4.2 of the Rules and Regulations that the plaintiff must give prompt instruction to stop payment of cheques.

14.10 I agree with the contention of the defendant that cl. 4.2 of the Rules and Regulations clearly brings home the importance of not delaying any stop payment instructions on the part of the customers.

14.11 The plaintiff's letter instructing the defendant to stop payment of the Stolen Cheques was only received by the defendant on 19 November 2003.

14.12 By the time the defendant received the said letter it was no longer possible for the defendant to fully comply with plaintiff's instruction since the Stolen Cheques had been honoured by the defendant between 13 November 2003 to 18 November 2003.

14.13 I find that there was delay on the part of the plaintiff to instruct the defendant to stop payment of the Stolen Cheques.

14.14 So cl. 4.2 of the Rules and Regulations give protection to the defendant in honouring the Stolen Cheques.

[15] In view of the foregoing I find that on the balance of probabilities the plaintiff has failed to establish its claim against the defendant.

15.1 I therefore dismiss the plaintiff's claim with costs.